Supreme Court, U.S.
FILED
00-889 NOV 22 2000
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NO. _____

CLYDE W. SMITH, JR.

Petitioner.

V.

Donna Lee Williams, Insurance Commissioner
of the State of Delaware, as Receiver of
National Heritage Life Insurance Company,
a Company in Liquidation

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 11th CIRCUIT

James D. Pierce
1100 Louisiana # 1250
Houston, Texas 77002
(713)650-0150
Attorney for Petitioner
Clyde W. Smith, Jr.

36pp

Question Presented for Review

The District Court granted summary judgment for Respondent on her Florida civil theft claim. Fla. Stat § 772.11. The 11th Circuit Court of Appeals found that the expert testimony of a "forensic accountant" was sufficient to meet the Respondent's initial summary judgment burden of showing by clear and convincing evidence that Petitioner acted with felonious intent to steal.

Can a party seeking summary judgment under Fed. R. Civ. P. 56 meet its initial burden of establishing no genuine issue of material fact by the use of a forensic expert to establish the non-moving party's state of mind?

List of Parties to the Proceeding

The following is a list of all parties to the proceeding in the court whose judgment is sought to be reviewed, and a list of parent companies and nonwholly owned subsidiaries as required by Rule 29.6.

Lambert G. Aloisi

Anna Patricia Aloisi

Michael Blutrich

Capital Clearing Corporation

William J. Ford

Wesley H. Hocker

Hocker, Morrow & Plato, L.L.P.

Phoenix Trust, Ltd.

Richard M. Plato

Richard M. Plato, P.C.

Clyde W. Smith, Jr.

Patrick C. Smythe

Donna Lee Williams, Commissioner of Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance Company, a company in liquidation.

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Citations of Official and Unofficial Reports of the Opinions and Orders

The opinion of the 11th Circuit Court of Appeals is unpublished, and was styled Donna Lee Williams, Commissioner of Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance Company, a compay in liquidation vs. Patrick C. Smyth, et al., No. 99-14413 (11th Cir. July 3, 2000) rehearing denied (August 25, 2000). The opinion of the district court is also unpublished, and styled Donna Lee Williams, Commissioner of Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance Company, a compay in liquidation vs. Patrick C. Smyth, et al., No. 95-910-CIV-ORL-22B (D.C.M.D. Fl. January 11, 1999).

Statement of the Basis for Jurisdiction

The judgment of the Court of Appeals was entered July 3, 2000. Clyde W. Smith's Petition for rehearing was filed and was denied August 25, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved in Case

Fed. R. Civ. P. 56

Rule 56. **Summary Judgment**

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not

in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Statement of the Case

This case involves a civil claim by Respondent, Donna Lee H. Williams ("Williams"), as receiver for National Heritage Life Insurance Company ("National Heritage"), against its former CPA, Clyde W. Smith, Jr., ("Smith") for civil theft under Florida's civil theft statute.

National Heritage was a life insurance company regulated by the State of Delaware. National Heritage granted Phoenix Trust, Ltd. ("Phoenix") an exclusive right to reinsure or cause to be reinsure $50 million of National Heritage's annuity portfolio. Later, Phoenix offered to arrange for a swap of mortgage loans and cash in exchange for National Heritage's mortgage backed bonds. Phoenix sold the bonds and took $16.6 million from the proceeds. Williams was appointed receiver and suit was filed against officers and consultants of National Herritage and trustees and representatives of Phoenix, including Petitioner, who was a CPA for Phoenix and National Heritage. Many of Defendants below plead guilty to criminal charges arising out of the case. Smith defended himself *pro-se*. The District Court granted summary judgment for over $56 million against Smith.

The district court's summary judgment order against Smith identified paragraphs 30, 31, and 33 of the Expert Report and Declaration of Regan R. Rockhill (Appendix 6) as providing the basis of the summary judgment against Smith. Rockhill was a forensic expert hired by Appellee's counsel to provide expert testimony. Rockhill was not a percipient witness, but testified concerning his opinions based upon a review of documents. Rockwell testified that he was a CPA, an attorney and had experience in forensic accounting. Rockhill's concluded that it was his "opinion Clyde W. Smith, Jr. was a knowing participant in the theft of $16.6 million from NHL,." and that he violated Florida Statutes §812.014(1)(a). Rockwell also stated: "we may never know the true extent of his [Smith's] participation in the scheme to steal $16,6 million from NHL." The district court expressly relied upon this testimony in granting summary judgment against Smith.

Basis of Federal Jurisdiction in the First Instance

The basis of jurisdiction in the first instance was diversity of citizenship under 28 U.S.C. § 1332.

Argument for Allowance of Writ

The issue raised is whether "forensic" expert testimony concerning a party's state of mind is sufficient to "show no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

This Court has held summary judgment is inappropriate where expert testimony supplies evidence on issues of fact. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627-28 (1944). The limited exception to the Sartor rule is on issues concerning "technical questions beyond the competence of lay determination." The 11th Circuit Court of Appeals held that forensic expert Rockhill's testimony fit this exception, because he analyzed complex economic transactions.

While Rickhill may have analyzed complex economic transactions, the issue of fact was not whether the transaction was complex. The fact issue to be decided was whether the Petitioner had the requisite felonious intent to steal? There are no "experts" on state of mind. A forensic expert could never reliably testify on issues such as intent. See Kumho Tire Co., v. Charmichael, 526 U.S. 137, 154 (1999).

Federal Rule of Civil Procedure 56 authorizes summary judgment when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The moving party bears the heavy burden of demonstrating that no dispute as to any material fact exists. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The movant bears an initial burden to show its entitlement to summary judgment. Id. Before a trial court examines the sufficiency of a response to a motion for summary judgment, it must first determine whether the movant met its initial burden of proof demonstrating the absence of any disputes of material fact. Jones v. City of Columbus, 120 F.3d 248, 253-54 (11th Cir. 1997). The court must examine the evidence presented in a light most favorable to the party

opposing summary judgment. "This means that the assessment required is substantially similar to, although perhaps even more stringent than, that involved in the assessment of the actual evidence on motions for directed verdict." Charbonages De France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Stated another way, summary judgment is proper only if a jury verdict for the non-movant could not be upheld on the evidence presented. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627-28 (1944).

To obtain summary judgment, the Respondent had the initial burden to present evidence that the Petitioner had the requisite mental state. It attempted to do so through the testimony of its forensic expert. Under the Sartor rule, summary judgment is appropriate only if a jury could not in the exercise of its discretion disregard the forensic evidence concerning Petitioner's mental state as presented by the Respondent. "Intent" has always been a "pure issue of fact." Crawford-El v. Britton, 118 S. Ct. 1584, 1592 (1998). In our system of justice, the only "experts" on "intent" or a party's state of mind is the finder of fact. Summary judgment cannot be based upon a forensic expert's opinions concerning Petitioner's state of mind and the courts below erred.

Conclusion

Petitioners pray that the Court reverse and vacate the judgment of the district court, and remand the case for a new trial, and for such other and further relief as is just.

Respectfully Submitted,

James D. Pierce
1100 Louisiana Suite 1250
Houston, Texas 77002
(713)650-0150

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the 11th Circuit has be furnished by U.S. Mail to Thomas K. Equels, Holtzman, Krinzman, Equals & Furia, 16 West Pine Street, Orlando, Florida 32801 attorneys for Plaintiff this 22nd day of November, 2000.

James D. Pierce

James D. Pierce

APPPENDIX 1

(January 11, 1999)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DONNA LEE WILLIAMS, Commissioner of Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance Company, a Company in liquidation,

Plaintiff,

CASE NO. 95-910-CIV-ORL-22B

vs.

PATRICK C SMYTHE et al.,

Defendants.

_____/

ORDER

Upon the Court's review of this case, it is ORDERED as follows:

1. Plaintiff's Renewed Motion for Summary Judgment Against Defendant Patrick C. Smythe (Dkt.521), filed April 27, 1998, is GRANTED.

Smythe has not responded to the motion. Plaintiff's submissions establish that there are no genuine issues of material fact concerning Smythe's liability, and that Plaintiff is entitled to judgment as a matter of law.

2. Plaintiff's Motion to Eliminate or Reduce Security Required to Support Preliminary Injunction (Dkt. 557), filed September 11, 1998, is GRANTED. No party has responded in

opposition to the motion. Security for the Court's March 18, 1996 Preliminary Injunction is reduced from $500,000 to $50,000. Within eleven (11) days, Plaintiff's counsel shall file and serve a document disclosing Plaintiff's taxpayer identification number and stating the name and address of the person to whom funds on deposit with the Clerk in excess of $50,000 should be disbursed.

3. Defendant Clyde W. Smith, Jr.'s Motion to Amend Case Management and Scheduling Order Including Request for Continuance (Dkt. 565), filed October 2, 1998, is DENIED. Smith has not shown good cause for the relief requested in the motion.

4. Plaintiff's Objection to and Motion to Strike Expert Report of John W. Wagner Attached to Defendant Clyde W. Smith, Jr.'s November 20, 1998 Notice of Filing (Dkt. 587), filed December 1, 1998, is GRANTED. Defendant Smith has not bothered to respond to the motion. Plaintiff has demonstrated that Smith did not timely disclose expert witness John Wagner and that Plaintiff has been prejudiced by that non-disclosure. Accordingly, Smith will not be allowed to use Wagner's report in opposition to Plaintiff's motion for summary judgment.

5. Plaintiff's Renewed Motion for Summary Judgment Against Clyde W. Smith, Jr., or in the Alternative, Motion for Compensatory Civil Contempt Award (Dkt. 572), filed November 2, 1998, is GRANTED IN PART AND MOOT IN PART.

The motion is GRANTED insofar as it seeks summary judgment against Defendant Clyde W. Smith, Jr. Plaintiff has demonstrated the absence of disputed issues of material fact, and its entitlement to judgment as a matter of law.

The Court has already determined that Smith cannot use the report of expert witness John W. Wagner to oppose summary judgment. Accordingly, that report does not create any genuine issue of material fact. The Court rejects Smith's contention that Plaintiff's claim is barred by the doctrines of res judicata or collateral estoppel. As noted in Plaintiff's motion, the bankruptcy court order upon which Smith relies expressly left intact the right of any entity other than LifeCo Investment Group, Inc. to pursue claims such as advanced by Plaintiff in the

instant case. [1] Accordingly, Plaintiff's evidence that Smith knowing and intentionally participated in the theft at issue, see, e.g., Dkt. 574 ¶¶ 30, 31 & 33, stands unrebutted by competent summary judgment evidence.

Judgment against Smith is independently warranted as a sanction for Smith's refusal to participate in the preparation of a final pretrial statement, in violation of the Court's Case Management and Scheduling Order and Local Rule 3.06.

Insofar as the motion alternatively seeks a compensatory civil contempt award against Smith, it is MOOT.

6. Defendant, Clyde W. Smith, Jr.'s Motion to Dismiss for Failure to State a Claim Based on Res Judicata and Collateral Estoppel (Dkt. 597), filed December 21, 1998, is DENIED. See ¶ 5 of this Order.

7. Plaintiff's Motions in Limine (Dkts. 584, 585 & 586), filed December 1, 1998 are MOOT.

8. Defendant Clyde W. Smith, Jr.'s Motion to Compel Depositions and to Disqualify Plaintiff's Attorney, Holtzman, Krinzman Equals & Furia (Dkt 595), filed December 11, 1998, is DENIED.

9. Plaintiff's Notice of Voluntary Dismissal as to Defendant Capital Clearing Corporation (Dkt. 594), filed December 10, 1998, is GRANTED. Capital Clearing Corporation is DISMISSED as a defendant herein. The Clerk shall terminate Capital Clearing Corporation as a party to this action.

10. The Clerk is directed to enter a final judgment

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1. In his "Motion in Opposition to Plaintiff's Renewed Motion for Summary Judgment, etc." (Dkt. 580), filed on November 23, 1998, Smith incorporates his "earlier arguments against the original motion" for summary judgment. The only argument raised in Smith's response to the original motion for summary judgment was the res judicata/collateral estoppel argument he now advances here. *See* Defendant Smith's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (Dkt. 428), filed September 29, 1997.

providing that the Plaintiff, Donna Lee Williams, Commissioner of Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance Company, a company in liquidation, shall recover from Defendants, Patrick C. Smythe and Clyde W. Smith, Jr., the sum of $49,773,456.00, plus interest in the amount of $6,700,569.00, for a total sum of $56,474,025.00. The Court reserves jurisdiction to consider an award of fees and costs against these defendants.

11. The Clerk shall forward a copy of this Order to the United States Bankruptcy Court for the Southern District of Texas, Houston Division, and shall bring to the attention of the Bankruptcy Clerk that this Order relates to Clyde W. Smith, Jr.'s Chapter 7 bankruptcy case, no. 97-44673-H3-7.

12. The case is removed from the January 1999 trial docket.

13. Within eleven (11) days, the parties shall advise the Court of any further matters they believe remain pending in this action.

DONE AND ORDERED in Chambers in Orlando, Florida, this 11th day of January, 1999.

s/_____

ANNE C. CONWAY

United States District Judge

Appendix 2

[July 3, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14413
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 03, 2000
THOMAS K. KAHN

D.C. Docket No. 95-00910-CIV-ORL-22

DONNA LEE WILLIAMS, Commissioner of Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance Company, a Company in liquidation,

Plaintiff-Appellee,

versus

PATRICK C. SMYTHE,
PHOENIX TRUST LTD., et al.,

Defendants,

CLYDE W. (RICK) SMITH,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

(July 3, 2000)

Before BIRCH, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Clyde W. (Rick) Smith appeals the district court's grant of summary judgment to Donna Lee Williams, Insurance Commissioner of the State of Delaware, as Receiver of National Heritage Life Insurance Company (National Heritage), in a diversity complaint for civil theft, pursuant to Fla. Stat § 772.11.[1]

On appeal, Smith argues that the district court erred by granting summary judgment for National Heritage because National Heritage did not present evidence that he had the felonious intent to participate in a scheme to steal funds from National Heritage. Smith also argues that the court erred by finding that summary judgment was warranted, alternatively, as a sanction for his failure to obey the court's case management order.

We review de novo the district court' order granting summary judgment, viewing the record and all its inferences in favor of the nonmoving party. See Arrington v. Cobb County, 139 F.3d 865, 871 (11th Cir. 1998). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment

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1. Williams moved for summary judgment on claims for civil theft and conversion. Because the district court awarded treble damages, we assume that the grant of summary judgment was for civil theft. See Fla. Stat. § 772.11 ("Any person who proves by clear and convincing evidence that he has been injured in any fashion by reason of any violation of the provisions of [sections for the Florida code covering the crime of theft] has a cause of action for threefold the actual damage sustained ....")

as a matter of law. See Eberhardt v. Waters, 901 F.2d 1578, 1580 (11th Cir. 1990).

National Heritage sought to divest itself of mortgage-backed bonds issued by government agencies. In pursuit of that goal, National Heritage granted to Phoenix Trust, Ltd. ("Phoenix") an exclusive right to reinsure or cause to be reinsured or purchased $50 million of National Heritage's annuity portfolio. When the parties were unable to negotiate a reinsurance agreement, Phoenix offered to arrange for a swap of mortgage loans and cash in exchange for National Heritage's mortgage backed bonds. National Heritage later learned that Phoenix had sold the bonds and taken $16.6 million for the proceeds. Williams filed suite against officers and consultants of National Heritage and trustees and representatives of Phoenix, including Smith. Several of Smith's co-defendants pled guilty to criminal charges arising out of the financial transactions at issue in this case, and only Smith appeals from the grant of Williams' renewed motion for summary judgment on her claims of civil theft and conversion.

In support of her renewed motion for summary judgment, Williams submitted the following evidence: (1) a declaration from Gail Kasmir, who had been National Heritage's Chief Financial Officer during the relevant time period, asserting that Smith had worked as a consultant for National Heritage and that he had assisted in preparing National Heritage's 1993 financial statements, which included the transactions as issue in this case; (2) the criminal plea agreement of Smith's co-defendant, Richard Plato, in which Plato states that he and Smith had acted as agents for Phoenix, that he and others had sold National Heritage's mortgage-backed bonds for the purpose of stealing $16.6 million of the proceeds, and that the money was distributed to Smith, among others; (3) the criminal plea agreement of Smith's co-defendant, William J. Ford, who stated that he had helped launch a plan to steal from National Heritage and to distribute the proceeds to Smith, among others; and (4) the declaration of Williams' expert in forensic accounting, Regan Rockhill, who stated that he had reviewed the documents relevant to this litigation and concluded that Plato had wired proceeds from the sale of the mortgage-backed bonds to accounts controlled by Smith. In addition, Williams'

notes that Smith repeatedly invoked the Fifth Amendment when questioned regarding his involvement with Phoenix and the distribution of the funds stolen from National Heritage.

On appeal, Smith argues that Williams did not meet her burden of showing by clear and convincing evidence that Smith acted with a felonious intent to steal, as required under Florida's civil theft statute. Fla. Stat. § 772.11; Westinghouse Electric Corp., Inc. v. Shuler Bros., 590 So.2d 986, 988 (Fla. Dist. Ct. App. 1991). Summary judgment is often inappropriate where expert testimony supplies the evidence bearing on crucial issues of fact. Webster v. Offshore Food Service, Inc., 434 F.2d 1191, 1193 (5th Cir. 1970).[3] In Webster, however, the former Fifth Circuit held that summary judgment is appropriate based on the unequivocal, uncontradicted and unimpeached testimony of an expert witness, where the testimony bears on technical questions beyond the competence of lay determination. Id. Hear, Rockhill's conclusions were unequivocal, uncontradicted, and unimpeached.[4] Like the medical testimony relied on in Webster, Rockhill's analysis of economic transactions involved technical questions beyond the competence of lay persons. In any case, we find no evidence that the district court relied exclusively on Rockhill's declaration in granting summary judgment.

We conclude that the district court did not err by granting summary judgment for Williams. Williams submitted sufficient evidence to establish that Smith intended to participate in a scheme to steal from National Heritage, and Smith presented nothing rebutting that evidence. Consequently, no genuine issue of material fact remains. Because the court did

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2. In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

3. Although Smith submitted the deposition testimony of his co-defendant, Plato, Plato's testimony does not effectively rebut or impeach Rockhill.

not err by granting summary judgment on the merits, we need not reach Smith's challenge to the court's grant of summary judgment on alternative grounds.

AFFIRMED.

Appendix 3

[August 25, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14413-BB

DONNA LEE WILLIAMS, Commissioner of Insurance
for the State of Delaware, as Receiver for
National Heritage Life Insurance Company, a
company in liquidation,
Plaintiff, Appellee,

versus

CLYDE W. (RICK) SMITH,
Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Florida

BEFORE: BIRCH, CARNES, and BARKETT, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, Clyde W. Smith, Jr., is DENIED.

ENTERED FOR THE COURT:

S/_____

UNITED STATES CIRCUIT JUDGE

Appendix 4

[July 3, 2000]

UNITED STATES COURT OF APPEALS

For the Eleventh Circuit

No. 99-14413

Non -Argument Calendar

District Court Docket No. 95-00910-CIV-ORL-22

DONNA LEE WILLIAMS, Commissioner of Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance Company, a company in liquidation,

Plaintiff-Appellee,

versus

PATRICK C. SMYTHE,

PHOENIX TRUST LTD., et al.,

Defendants,

CLYDE W. (RICK) SMITH, Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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Before BIRCH, CARNES and BARKETT, Circuit Judges.

IUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the

Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the defendant-appellant pay to the plaintiff-appellee, the costs on appeal to be taxed in accordance with Fed.R.App.P.39.

Entered: July 3, 2000

For the Court: Thomas K. Kahn, Clerk

By: S/ _____

Deputy Clerk

ISSUED AS MANDATE:

Appendix 5

(January 12, 1999)

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

DONNA LEE WILLIAMS, Commissioner of Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance Company, a company in Liquidation

Plaintiff,

-vs-

Case No.. 95-910-Civ-Orl-22B

PATRICK C SMYTHE et al.,

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Plaintiff, Donna Lee Williams, Commissioner of Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance Company, a company in liquidation, shall recover from Defendants, Patrick S. Smythe and Clyde W. Smith, Jr., the sum of $49,773,456.00, plus interest in the amount of $6,70,569.00, for a total sum of $56,474,025.00. The Court reserves jurisdiction to consider an award of fees and costs against these defendants.

Date: January 12, 1999
RICHARD D. SLETTEN, CLERK

By: s/_____
N. Stephens, Deputy Clerk

Appendix 6

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DONNA LEE WILLIAMS, Commissioner of Insurance for the State of Delaware, as Receiver for National Heritage Life Insurance Company, a Company in Liquidation,

Plaintiff,

CASE NO. 95-910-CIV-ORL-22B

vs.

PATRICK C SMYTHE et al.,

Defendants.

_____/

EXPERT REPORT AND DECLARATION OF REGAN R. ROCKHILL

I, Regan R. Rockhill, declare pursuant to the provisions of 28 U.S.C. §1746 as follows:

INTRODUCTION

1. I have been retained by Holtzman, Krinzman, Equels & Furia, counsel for Donna Lee Williams, Commissioner of Insurance for the State of Delaware, As Receiver for National Heritage Life Insurance Company, a Company in Liquidation (hereinafter "NHL"), to provide expert analyses and to testify,

if necessary, regarding certain financial activities and the movement of money arising in the present case. This report contains my expert opinions as to various fraudulent activities, theft of moneys, movement of money and the laundering of money offshore from a financial perspective. This report is based upon the information currently available to me. If information were to come to my attention which caused my opinions to change, I reserve the right to supplement this report incorporating such information.

QUALIFICATIONS

2. My qualifications are based upon my education, training and experience which are set forth subsequently. A copy of my resume is contained in Tab 1. Further, in compliance with Rule 26 of the Federal Rules of Civil Procedure, my publications during the past ten (10) years and my testimony during the previous four (4) years (either in deposition or at trial) are set forth in Tab 2. My firm has billed counsel for NHL on a time-and-materials basis for my work and that of my associates. My hourly billing rate for my services is $150. I have directed the efforts of other associates, whose billing rates range from $60-$85.

3. **Education:** I have an undergraduate degree in Engineering and have done graduate studies in Engineering. I have a Masters of Business Administration with concentration in Accounting and Finance. I also have a Law Degree. I am licensed as an attorney in two states and as a CPA in one state and the District of Columbia. I am a member of the American Bar Association (ABA), the American Arbitration Association (AAA), the American Institute of CPA's (AICPA) and the District of Columbia Institute of CPAs and the DCICPAS. I am also a Certified Fraud Examiner and a member of the Association of Certified Fraud Examiners.

4. **Training:** I have taken courses, attended seminars and workshops on accounting, fraud, white collar crime, and other relevant matters. I have taught courses and seminars on behalf of AICPA, the DCICPA and other entitles relating to fraud, litigation, and other forensic accounting issues. This includes the detection of fraud and illegal acts in the audit process, computer fraud and litigation related courses, such as business

valuation and damage analysis. I have also taught at the FBI Academy on forensic accounting and the investigation of financial crimes. I speak before professional organizations on a variety of matters including white collar crime and forensic investigations. I have also published articles on numerous topics including white collar crime.

5. **Experience:** I have been appointed by a state court as the determiner of facts in a criminal embezzlement case. I have represented the U.S. Department of Justice and the DEA in analyzing money laundering activity. I have been involved in providing support to counsel, insurance companies, corporations, individuals and governments for matters which are in dispute. This has included investigating approximately 200 matters involving fraud, embezzlement, or defalcations of various sorts occurring in banks, insurance companies, brokerage firms, wholesalers, retailers , government agencies and service organizations such as law firms, accounting firms, etc. In addition, I have been involved with scores of commercial litigation matters. I have been qualified as an expert in Federal Courts (PA, NY, NJ, VA, SC, FL). Bankruptcy Courts (PA, MD) and State Courts (PA, NJ, MD, DC). I have given expert testimony in court approximately 25 times and have been deposed in approximately 30 matters, where I was identified as an expert.

PROCEDURE PERFORMED AND EVIDENCE CONSIDERED

6. In preparing and performing the analyses set forth in this report, I have reviewed, analyzed, relied upon and/or considered information from a variety of sources. My review and analysis included the tracing of money from bank and other records, analysis of documents including communication, instructions, terms, etc. and review of statements/information contained in various legal filings and pleadings. All such materials and the information/statements contained therein, are of the type that an expert in my field would reasonably rely upon in forming his or her opinions. A list of the information considered is set forth in Tab 3.

ANALYSIS AND OPINIONS

7. Based upon my review and analysis of the documents and other information, the following summarizes key points:

8. Patrick Smythe (hereinafter "Smythe"), Lambert Aloisi (hereinafter "Aloisi"). Michael Blutrich (hereinafter "Blutrich") and others participated in a scheme and/or conspiracy to defraud NHL, beginning with the initial purchase of Lifeco Investment Group, Inc. (hereafter Lifeco"), the parent company of NHL, by Tri-Atlantic Holdings, Inc. in September, 1990. The purchase of Lifeco by Tri-Atlantic Holdings was consummated by the aforementioned individuals through the use of a check kiting scheme to acquire a controlling interest in Lifeco. The transactions at issue in this case are but an example of the acts perpetrated upon NHL as it was defrauded out of millions of dollars.

9. Beginning in August, 1993 a scheme involving Plato, Smythe, Clyde W. Smith, Jr. a/k/a Rick Smith ("Smith") and others was put into effect causing the transfer of preferred amortization class securities ("PACS") with a face value of approximately $145,000,000 to Westcap Securities in the name of Richard M. Plato, PC, Escrow Account for National Heritage Life Insurance Company.

10. Between December 1, 1993 and June 1994, Plato and others, including Smith and Smythe, stole and converted $16,591,151.50 of NHL money taken from the PAC proceeds, for their own use and benefit. Plato admitted to distributing over $16.5 million to himself and others, including Patrick Smythe (approximately $5,214,000) and Clyde W. Smith. Further, he admits that ... "Smythe caused the defendant (Plato) to forward $3,000,000 of Smythe's $5,214,000 to Aloisi". Smythe similarly has admitted his involvement in the theft. The primary vehicle through which the stolen funds flowed was Phoenix Trust, Ltd., and entity formed by Plato and William J. Ford, (hereafter "Ford"). Smith was an agent of Phoenix Trust and was intricately involved in the transactions.

11. The following are some of the transfers which were made from Phoenix Trust accounts involving the funds stolen from NHL.

12. A total of $1,860,377.07 was transferred to San

Jacinto Abstract Company. These funds were the purchase money for an office building in downtown Houston, Texas known as the Great Southwest Life Insurance Building. This sale took place on December 9, 1993.

13. A total of $1,960,761 was transferred to American Capital Business Loans, a company controlled by Ford. According to the July, 1997 information and indictment of Mr. Ford, American Capital was one of many nominee companies/accounts used by Ford to hide the movement and ownership fo money and other assets.

14. A total of $275,000 was issued via checks to Plato.

15. $950,000 was transferred to Plato's personal account at Merrill Lynch.

16. A total of $14,000 in checks was made payable to "cash". Additionally, in the period of March-May 1993, an additional $8,200 in checks signed by Plato and payable to "Cash" were made.

17. A total of $1,382,00 was transferred to Momentum Energy Resources Corporation. According to Plato, Phoenix Trust also received gold bearer bonds for this payment. These bonds have been ascertained to be without value.

18. $300,000 was transferred to Conversion Oil and Gas, another company controlled by Plato. According to Plato, Phoenix Trust received gold bearer bonds for this payment. These bonds have been ascertained to be without value.

19. A total of $790,613 was transferred to Somerset Properties, a company controlled by Clyde W. Smith, Jr. Further, Mr. Smith states he received $200,000 personally from Phoenix Trust for a total of $990,613. In addition, Mr. Smith in response to a Court Order to provide an accounting of all funds received directly or indirectly from NHL, executed an Affidavit signed July 20, 1997, wherein he states he personally received $904,824 (net of transfers to related personal accounts) and Somerset Properties received $221,276 (net of transfers) for a total of $1,126,100. Due to the conflict in the amounts and the ambiguity of Mr. Smith's Affidavit, it is unclear as to exactly how much he received.

20. $239,00 was transferred to Riley Super Rocket for

the purchase of a Cessna Skymaster aircraft for Ford.

21. Defendants' efforts to conceal their theft of $16.6 million from NHL include the transfer of at least a portion of those funds to offshore accounts for money laundering. These funds were laundered through Jay Bartz. On December 22, 1993, $2,214,000 was wire transferred to an offshore account in the Channel Isles. This account was Westcap Banking Corp., Account No. 009233, in the name of New Horizons, Ltd. and was controlled by Mr. Bartrz. Pursuant to Mr. Bartz's Plea Agreement and supported by other third party documents, the $2.2 million was transferred by Mr. Smythe and Mr. Plato from Phoenix Trust, Ltd., the recipient of the $16.6 million of stolen NHL money.

22. Mr. Bartz is a convicted money launderer. Mr. Bartz laundered money for a number of people including Blutrich, Smythe and Aloisi. Mr. Bartz maintained computerized records of the transactions he conducted for Blutrich, Smythe and Aloisi. Mr. Bartz maintained computerized records of the transactions he conducted for Blutrich, Smythe and Aloisi, including listings for specific companies used to launder money as well as individual listings. Mr. Bartz's records also include bank statements, checks, instructions form these individuals for the movement of money, correspondence and other documents. These records show that the transfer of the $2.2 million, traced to the sale of NHL's PACS, was neither the first nor the last occasion where Mr. Bartz laundered money for Blutrich, Smythe, and/or Aloisi.

23. Mr. Bartz's records indicate that Messrs. Blutrich, Smythe, and Aloisi had ongoing transactional activity with Mr. Bartz, in 1992, 1993, and 1994. Mr. Bartz's records further demonstrate that, at the time of the deposit of the $2.2 million into the New Horizon account, Blutrich, Smythe, and Aloisi were engaged in an ongoing scheme or enterprise, dating from at least May 1992, to launder money improperly obtained from NHL. In May 1992 approximately $837,000 of NHL money, which had been wired to an account in the name of Blutrich, was wire transferred offshore to an account under the control of Bartz an credited in Bartz's records to Blutrich, Smythe and Aloisi.

24. Blutrich, Smythe, and Aloisi's money laundering scheme or enterprise was accomplished through the use of offshore corporations or entities in countries with strict secrecy laws, such as the Channel Islands and the Cayman Islands. These entities, which including New Horizons Ltd., Anglo Properties International Ltd., Jefferson Insurance Co., Middle East Oil Company and others, were used to conceal the identity of the persons who owned the entities and to conceal the transfer of funds to and from these entities. The accounts were under Bartz's control, who commingled and transferred funds in and out of those accounts pursuant to the instructions of Blutrich, Smythe and Aloisi.

25. Subsequent to the deposit of $2,213.995 ($2,214.00 less transfer fees) into the New Horizons, Ltd. account at Westcap Banking Corporation in the Channel Islands, funds were disbursed to or for the benefit of Mr. Blutrich directly from that account. Specifically, check number 3301 dated June 2, 1994, in the amount of $50,000 from the New Horozon account was credited to Mr. Blutrich by Mr. Bartz.

26. Further, on April 27, 1994, two checks were issued, at Mr. Blutrich's request, from the Anglo Properties account which were also credited to Mr. Blutrich. The Anglo Properties account was specifically mentioned in Mr. Bartz's plea agreement as one of the accounts used to launder money. Check number 1117 for $15,000 was issued to Walter Bilzinsky, an associate of Mr. Blutrich, and check number 1115 for $25,000 went directly to Mr. Blutrich. The back of check 1115 indicates the check was deposited into an account of Mr. Blutrich's at European Amercian (EAB) Bank of New York. In addition, the MasterCard account provided for Mr. Blutrich by Mr. Tartz included transactions involving case withdrawals as well as purchases from such stores as Cartier's Macy's and Footlocker.

27. On or about April 4, 1995 Jay Bartz interpled and deposited with the U.S. Bankruptcy Court in Arizona, the sum of $1,817,615.87. According to Mr. Bartz, the entities named as defendants in the Interpleader complaint either claimed an interest in the money or may have had an interest in the money. Messrs. Plato, Smythe and Blutrich were named as defendants in the Interpleader Complaint. The money deposited with the Court of Bartz agrees exactly with the amounts shown in Bartz's

records for Mr. Blutrich and Mr. Smythe just prior to his interpleading the funds.

28. Based upon my review and analysis of the information previously identified in this report, it is my opinion that Mr. Smythe, Mr. Blutrich and Mr. Aloisi were participants in an ongoing scheme or enterprise wherein: (1) they used fraudulent means to acquire NHL funds; and (2) they used Jay Bartz to launder the funds improperly obtained from NHL. Further Mr. Blutrich, Mr. Smythe and Mr. Aloisi were the recipients, directly or indirectly, of NHL funds laundered by Mr. Bartz via New Horizons, Ltd., Burlington-MB, Burlingame - LA, Anglo Properties International, Ltd. accounts and others. Some of these laundered funds are directly traceable to the $2,213,995 transferred from Phoenix Trust to the New Horizons account under Bartz's control.

29. In addition, proceeds from the $16.6 million involved in this case have also been traced to defendants Smythe, Plato, Smith and others as set forth in the previous paragraphs.

30. Based upon my review and analysis of the information previously identified in the report, it is my opinion that Clyde W. Smith, Jr. was a knowing participant in the theft of $16.6 million from NHL, and Mr. Smith was the recipient of approximately $1 million of the stolen funds.

31. By virtue of his position as a financial consultant for NHL, and his involvement in the operations of NHL and LifeCo, in late 1993 and early 1994, Mr. Smith was intricately involved in NHL's financial affairs. NHL's Chief Financial Officer, Gail Kasmir, effectively reported to Mr. Smith during this period. Mr. Smith had knowledge of the true facts surrounding the PAC/mortgage transaction and reinsurance agreement. Mr. Smith made false representations to NHL, and failed to disclose material information to NHL, regarding such matters.

33. Because Mr. Smith has invoked the Fifth Amendment, and because he has never fully accounted for the stolen funds he received, we may never know the true extent of his participation in the scheme to steal $16.6 million from NHL. However, based upon my review and analysis of the

information previously identified in this report, it is also my opinion the Mr. Smith, Mr. Smythe and others violated Florida Statutes §812.014(1)(a) in that each of them knowingly endeavored to and did obtain and use NHL's property (specifically, PAC sale proceeds) with the intent of depriving NHL from the right to that property and the benefits therefrom. Smith, Smythe and others shared in the proceeds of this theft and actively participated in the concealment of this theft.

34. The foregoing report represents my opinions on these issues.

I declare under penalty of perjury this (4th) day of October, 1998, that the foregoing is true and correct.

s/_____

Regan R. Rockhill

Supreme Court, U.S.
FILED
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No. 00-889

In The

Supreme Court of the United States

CLYDE W. SMITH, JR.,

Petitioner,

v.

DONNA LEE WILLIAMS, Insurance Commissioner of the State of Delaware, as Receiver of National Heritage Life Insurance Company, a Company in Liquidation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent makes the following clarifications to Petitioner's Statement of the Case.

Respondent characterizes himself as a CPA for Phoenix and National Heritage. In reality, he was an agent of Phoenix Trust and intricately involved in the financial transactions at the heart of this case. Smith was also a financial consultant for National Heritage and involved in National Heritage's financial affairs. (Petitioner's Appendix 2, page 3; Petitioner's Appendix 6, ¶¶ 10, 31). Smith's statement that he defended himself pro se is only partially true. Smith was represented by successive counsel until each counsel withdrew (R. Dkt. Nos. 132, 291, 544), and was represented by counsel when the original response to the Commissioner's Motion for Summary Judgment was filed. (Petitioner's Appendix 1, page 3n.1).

Respondent states that the United States District Court's order granting summary judgment against Smith identified paragraphs 30, 31 and 33 of the Expert Report and Declaration of Regan R. Rockhill (Appendix 6) as providing the basis of the summary judgment against Smith. (Petitioner's petition at 4.) However, the order points to Rockhill's declaration as an example of the evidence against Smith. The order states: "Accordingly, Plaintiff's evidence that Smith knowingly and intentionally participated in the theft at issue, *see, e.g., Dkt. 574* ¶¶ 31, 31 & 33, stands unrebutted by competent summary judgment evidence." (Petitioner's Appendix 1, page 3).

The Eleventh Circuit found that there was no evidence that the district court relied exclusively on Rockhill's declaration in granting summary judgment. The

Court noted that the evidence submitted in support of summary judgment included the declaration of Gail Kasmir, National Heritage's Chief Financial Officer, and the criminal plea agreements of Richard Plato and William J. Ford. Kasmir's declaration and the two plea agreements implicated Smith in the scheme to steal from National Heritage. (Petitioner's Appendix 2, page 3).

Petitioner also asserts that Rockwell stated "we may never know the true extent of his [Smith's] participation in the scheme to steal $16.6 million from NHL." He omits, however, that this lack of knowledge is based in part upon Smith's repeated invocation of the Fifth Amendment when questioned regarding his involvement with Phoenix and the distribution of funds stolen from National Heritage. Smith's reliance on the Fifth Amendment privilege in this civil case was also noted by the Eleventh Circuit in its decision affirming the trial court. (Petitioner's Appendix 2, page 4).

ARGUMENT WHY CERTIORARI SHOULD NOT BE GRANTED

Rule 10 of the Rules of the Supreme Court indicate the character of reasons that will be considered in granting or denying petitions for certiorari. Those reasons include a decision of a circuit court of appeals that conflicts with another circuit court of appeals on the same important matter; has decided an important federal question in a manner that conflicts with a decision of a court of last resort; or has so departed from the accepted and usual course of judicial proceedings that this Court's supervisory power is required. Rule 10(a), Rules of the

Supreme Court. "A petition for writ is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10.

This case presents none of the bases for review suggested in Rule 10. While the reasons cited in the rule are not exclusive, the Court should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923).

Petitioner does not assert that the decision in this case creates the sort of conflict confusion suggested in Rule 10. He simply states that the lower court erred. An application of the Rules of Civil Procedure by a district court that is affirmed by a Court of Appeals will not be reviewed by the Supreme Court where the question is one that concerns the judgment of the district court judge with respect to a particular set of facts. *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 80 S. Ct. 16, 18 (1959). That is precisely the situation presented to this Court.

The district court judge granted summary judgment based upon documents that showed Smith's extensive participation in a scheme to defraud National Heritage of millions of dollars: funds meant for the protection of the elderly and infirm. She noted Regan Rockhill's expert opinion as an example of the unrebutted evidence that

Smith had committed civil theft. The Eleventh Circuit affirmed the district court's judgment and held, consistent with *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970), that use of an expert witness in support of summary judgment is appropriate based upon the unequivocal, uncontradicted and unimpeached testimony of the expert witness, where the testimony bears on technical questions beyond the competence of law determination. The Court concluded that Rockhill's testimony met this criteria, but also noted that the expert testimony was not the only evidence upon which the district court relied. This case does not present the type of issue that requires this Court's review. Accordingly, Respondent urges this Court to deny certiorari.

CONCLUSION

Respondents pray that the Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

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